

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35966

STATE OF IDAHO,)	2010 Unpublished Opinion No. 384
)	
Plaintiff-Respondent,)	Filed: March 16, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
LEONARDO NARANJO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Order dismissing charge of sexual abuse of a minor without prejudice, affirmed.

Werth Law Office, PLLC; Douglas A. Werth, Hailey, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

GUTIERREZ, Judge

Leonardo Naranjo appeals from the district court's order dismissing a charge of sexual abuse of a minor without prejudice. For the reasons set forth below, we affirm.

I.

BACKGROUND

On May 16, 2008, Naranjo was charged with sexual abuse of a minor in violation of Idaho Code § 18-1506. Naranjo was the boyfriend of the victim's sister and sometimes slept over at his girlfriend's house, which was also the home of the victim. The charge arose after the victim reported that Naranjo had entered her room at around 1:00 in the morning, asked if she had a cell phone charger, then touched her vagina with his finger and tried to get her to touch his penis. Naranjo entered a plea of not guilty and the court scheduled a jury trial. In advance of trial, on August 22, 2008, the state filed a notice of intent to offer evidence under Idaho Rule of Evidence 404(b). The evidence was the victim's disclosure that two months previous to the charged conduct, Naranjo engaged in very similar conduct in which he entered the victim's room

at 1:00 in the morning, asked for a phone charger, and touched the victim's buttocks. On October 21, after hearing, the district court ruled excluding the evidence of this prior uncharged act from the state's case-in-chief. Six days later, on the eve of trial, the state filed a motion to dismiss the case pursuant to Idaho Code § 19-3504 and Idaho Criminal Rule 48(a)(2). The prosecutor's motion stated:

The basis for the dismissal is as follows. In the present case, the Court heard the State's Motion to introduce 404(b) evidence on Tuesday, October 21, 2008. The Court ruled against the State and would not permit the State from [sic] eliciting testimony regarding an alleged incident of abuse in its case and [sic] chief. The State contends that the Court erred in this decision. Consequently, the State has decided to charge the defendant with two additional counts based on conduct included in the 404(b) motion and memorandum.

The state argued that it would be a waste of resources to have successive trials, the defendant would not suffer prejudice, and the victim would only have to testify once. The defendant objected, filing a written response stating:

In the case at bar, the State's motion to dismiss will serve neither "the ends of justice" nor "the effective administration of the court's business." The claimed reason for the State's motion is that it intends to file one or more additional charges against the Defendant. This is a transparent attempt to circumvent the Court's ruling on the I.R.E. 404 (b) evidence in this case. The State was aware of all of this prior information when it charged the Defendant in this case and made a strategic decision to charge one count of sexual abuse of a minor, presumably because the evidence on the prior incident was even weaker than the evidence supporting the current charge. If the State's true desire or motivation is to file an additional charge against the Defendant, it can do so in a second criminal action and does not need to dismiss the above-captioned case. Further, even if the State filed two or more charges together against the Defendant, the multiple charges nonetheless could be subject to a severance by motion of the Defendant depending upon the facts and circumstances of the charges. *See* I.C.R. 8 and 14.

The district court denied the motion to dismiss at hearing stating:

Ordinarily, I consider the State's business--if the State wants to dismiss or re-file, or if the State wants to dismiss a case. Under ordinary circumstances, it's not even something I look at.

It's the State's call; however, when we bump up against a trial date and the admitted purpose--and I appreciate your candor, Mr. Fredback [the deputy prosecutor], I want to be very clear about that--when the admitted purpose is to re-file the charge that the State already knew was there and the reason for re-filing it, is because the State wants to be able to get that into evidence without question.

And the effect, if not the intent, is to circumvent the ruling of the Court. It's not--I mean, that's the effect of it. And it might as well constitute a separate prosecutable criminal charge.

The question in the Court's mind is if it did, then it probably should have been filed and carried along as part of the case.

And it's a tough call whether it should be--this evidence should or should not be admitted into the State's case in chief. But it appears to me that the purpose of the dismissal and the re-filing is to re-file--to assert the same conduct that the State is trying to get in under [I.R.E.] 404B.

And that does not serve the effective administration of the Court's business or the administration of justice.

So as much as I don't want to, I'm going to deny the motion to dismiss.

The next day, on the morning of trial, the County Prosecutor appeared and informed the court that the state was not prepared to go forward and it did not intend to try the case and once again requested a dismissal. The County Prosecutor reiterated that it sought a dismissal so that the state could refile and charge additional conduct. The district court issued an Order Dismissing Count I of the Information. In doing so, the district court stated, "this court *specifically concluded on the record during the state's motion to dismiss that a dismissal by the state was not warranted and would not serve the ends of justice or the effective administration of the court's business.*" (Emphasis in the original). The district court determined that the timing of the events in this case was critical. It acknowledged that it would be one thing to dismiss and refile after a preliminary hearing, as most case law supports such a choice, but dismissal and re-filing is quite another thing under the circumstances that were present here. It stressed the fact that the state waited until an hour and a half prior to the close of business on the night before trial to file its motion to dismiss. The district court stated: "It is *the combination* of the state's attempted dismissal in order to bring new charges that it passed on before, *together with* its timing, *together with* the fact it was being done to circumvent an unfavorable 404(b) ruling, that brought about the court's denial of the state's motion to dismiss." (Emphasis in the original).

The district court went on to explain that it had two options; first, allow the jury to be empaneled and sworn, let jeopardy attach, after which the case would be dismissed and the defendant could not be retried on this charge; second, dismiss the case as a result of the state's unwillingness to proceed. After taking these options into consideration, the district court determined that it could not conclude that Naranjo should be entitled to an acquittal. It determined that the choice of whether Naranjo should be forever free of this charge was a decision best left to a higher court. The district court also noted that the state's authority to

dismiss and refile versus the court's authority to deny a motion to dismiss under what the court views as an inappropriate exercise of the prosecutor's authority is an issue to be resolved by the Idaho Supreme Court. The district court expressed its view that it thought this was a misuse of the state's ability to dismiss and refile, but refused to go down that road and reluctantly dismissed the case without prejudice. Naranjo appeals from the order of dismissal.

II.

ANALYSIS

Naranjo asserts that the district court erred when it failed to enter a dismissal with prejudice. In support thereof, Naranjo argues that this appeal is properly before the court pursuant to the holding in *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (Ct. App. 2008), and the Idaho Appellate Rules or, alternatively, pursuant to the Idaho Supreme Court's plenary appellate jurisdiction under Article 5, Section 9 of the Idaho Constitution;¹ that a prosecuting attorney does not have unfettered discretion to dismiss a felony charge without regard to the requirements of Title 19, Chapter 35, Idaho Code, and Idaho Criminal Rule 48;² that the district court properly exercised its discretion in initially denying the prosecutor's motion to dismiss when the motion did not meet the requirements of I.C. § 19-3504 and I.C.R. 48;³ that the effect of the district court's dismissal on the morning of jury trial is a bar to further prosecution for the same offense against Naranjo; that alternatively, Naranjo's due process rights under the Idaho and United States Constitutions were violated by the conduct of the prosecutor in this case and the district court's failure to enter a dismissal with prejudice on the morning of his jury trial; and that further prosecution of the dismissed charge should be barred because under the facts of this case the district court had inherent power to dismiss the charge with prejudice and the record clearly demonstrates the district court would have exercised that power had it known it was

¹ The state does not contest this issue, therefore we do not address it.

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³ This issue as framed is not properly before this Court. The ruling was actually favorable to Naranjo. The district court's subsequent ruling granting the motion to dismiss without prejudice also renders the issue moot. On appeal, Naranjo does not assert that it was error for the district court to dismiss the case, but only that the dismissal should have been with prejudice.

available. The latter three issues here are dispositive as they in essence cite error in the district court's failure to dismiss the charge with prejudice.

The district court dismissed the case pursuant to I.C.R. 48.⁴ Rule 48 uses the permissive term "may dismiss" rather than a mandatory "shall dismiss" and therefore we view the dismissal motion in this case to have been subject to the trial court's discretion. *State v. Dixon*, 140 Idaho 301, 304, 92 P.3d 551, 554 (Ct. App. 2004). *See also State v. Dudley*, 104 Idaho 849, 851, 664 P.2d 277, 279 (Ct. App. 1983). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Naranjo argues fervently that a district court has the inherent authority to dismiss a criminal case with prejudice and had the district court here so recognized it would have entered a dismissal with prejudice in this case. It is recognized that dismissal with prejudice may be appropriate irrespective of state statutory or criminal rules directing otherwise. For example, there are instances where dismissal with prejudice is required to protect the defendant's constitutional rights, including the constitutional protection against double jeopardy and the right

⁴ Idaho Criminal Rule 48 states:

(a) Dismissal on Motion and Notice. The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:

(1) For unnecessary delay in presenting the charge to the grand jury or if an information is not filed within the time period prescribed by Rule 7(f) of these rules, or for unnecessary delay in bringing the defendant to trial, or

(2) For any other reason, the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.

(b) Order of Dismissal. When a court dismisses a criminal action upon its own motion or upon the motion of any party under this rule, it shall state in the order of dismissal its reasons for such dismissal.

(c) Effect of Dismissal. An order for dismissal of a criminal action is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.

to a speedy trial. *See State v. Manley*, 142 Idaho 338, 127 P.3d 954 (2005) (holding that dismissal with prejudice is proper where further prosecution of the defendant is barred by the constitutional prohibition against double jeopardy). *See also Strunk v. United States*, 412 U.S. 434, 439-40 (1973) (holding that when there is a violation of the constitutional right to a speedy trial dismissal is the only possible remedy, even if in practice “it means that a defendant who may be guilty of a serious crime will go free, without having been tried” (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972))). Rule 48 specifies that the dismissal of a felony is ordinarily without prejudice by stating that a dismissed felony charge is not barred from further prosecution. Specifically, Rule 48(c) states: “An order for dismissal of a criminal action is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.” Similarly, Idaho Code § 19-3506 states: “An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony.” Considering the mandate of Rule 48 and I.C. § 19-3506, we hold that in the absence of a violation of Naranjo’s constitutional rights, the district court here had no authority to dismiss with prejudice.

Naranjo does assert in the alternative that his constitutional due process rights were violated by the conduct of the prosecutor in seeking and obtaining dismissal of this case. The filing of a subsequent criminal action following dismissal of the original criminal action after preliminary proceedings is not a per se violation of due process. *Stockwell v. State*, 98 Idaho 797, 805, 573 P.2d 116, 124 (1977). However, the dismissal and refiling of criminal complaints by the prosecutor, when done for the purpose of harassment, delay, or forum shopping, can violate a defendant’s right to due process. *Id.* at 806, 573 P.2d at 125; *State v. Averett*, 142 Idaho 879, 885, 136 P.3d 350, 356 (Ct. App. 2006). Before a due process violation can be found, the defendant must show that the dismissal and refiling caused substantial prejudice to the defendant’s right to a fair trial and that the delay was a deliberate device to gain an advantage over the defendant. *Id.* Furthermore, to support a due process claim, it is incumbent upon a defendant to affirmatively show actual prejudice and the effect of that prejudice upon his or her ability to present a defense. *State v. Murphy*, 99 Idaho 511, 515, 584 P.2d 1236, 1240 (1978). The proof of this prejudice must be definite and not speculative. *Id.*

Naranjo argues that the timing of the state’s motion to dismiss on the eve of trial was for the purpose of gaining a tactical advantage and to circumvent the district court’s ruling on the

Rule 404(b) evidence. However, the state does not necessarily act in bad faith when it seeks to undo a prior ruling by the court by way of refile after a dismissal. *State v. Fowler*, 106 Idaho 3, 13-14, 674 P.2d 432, 442-43 (Ct. App. 1983) (concluding that there was no violation of due process where the state refiled, because there was no evidence to prove that the state was not acting in a good faith belief that the magistrate court had committed error in an adverse suppression ruling). *See also State v. Avila*, 143 Idaho 849, 853-54, 153 P.3d 1195, 1199-1200 (Ct. App. 2006) (concluding that a delay did not violate the defendant's right to a speedy trial where the state withdrew the charges three days before trial and immediately refiled with an additional felony charge because there was no evidence that the state pursued this course to deliberately hamper the defense). When new evidence becomes available or when the prosecutor believes in good faith that the judge committed error, charges may be properly dismissed and refiled. *Fowler*, 106 Idaho at 14, 674 P.2d at 443.⁵

Although it may have been inappropriate for the state to wait until the day before trial to file its motion to dismiss the case, the district court made no finding that the prosecutor acted in bad faith and the record here does not compel such a conclusion. The dismissal motion resulted from the trial court's decision a week earlier conditionally disallowing evidence of Naranjo's uncharged misconduct with the victim. While the prosecutor's surprise at the trial court's ruling was unjustified,⁶ it apparently was nevertheless genuine. Upon receiving this ruling from the district court, the prosecutor recognized that there existed an alternative to proceeding to trial on the single charge against Naranjo without the other misconduct evidence, and that alternative was to dismiss the present case in order to refile, alleging both episodes of misconduct as individual offenses. Unquestionably, the prosecutor could have avoided the troublesome timing

⁵ On the other hand, the Ninth Circuit Court of Appeals has upheld the dismissal with prejudice of criminal counts when the state's motive was to circumvent the district court's orders. *See United States v. Towill*, 548 F.2d 1363 (9th Cir. 1977) (finding that dismissal without prejudice would deny the defendant a prompt trial and subject him to substantial prejudice and harassment).

⁶ Even where uncharged misconduct of a criminal defendant bears some probative value, it has always been within the trial court's discretion to exclude the evidence if its probative value is substantially outweighed by the risk of unfair prejudice, which was the trial court's finding here. Idaho Rule of Evidence 403; *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999); *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985). The state on appeal makes no contention that this evidentiary ruling by the trial court was erroneous.

of his dismissal motion by seeking a much earlier ruling from the trial court on the admissibility of the other misconduct evidence or by filing both charges in the first instance. However, the fact that the prosecutor made a late-timed motion to dismiss in order to remedy his own earlier choices does not constitute bad faith per se.

The one act of the county prosecutor that could arguably be viewed as bad faith was his announced refusal to participate in the trial if the district court denied the motion to dismiss the case. Whether it was intended as a means to coerce the court or not, it inherently carried a coercive element--it informed the court that if the case were not dismissed without prejudice upon the prosecutor's motion, it would ultimately have to be dismissed when the state presented no evidence at trial, and a dismissal at that point would preclude refiling the same charge against Naranjo due to the constitutional guarantee against double jeopardy. *See State v. Santana*, 135 Idaho 58, 64, 14 P.3d 378, 384 (Ct. App. 2000) (holding that jeopardy attaches when the jury is empaneled and sworn). In other words, the prosecutor's announcement forced the court to choose between granting the prosecutor's dismissal motion that the court had earlier denied, or dismissing at trial in circumstances that would enable the defendant to entirely escape prosecution for the alleged offense. Even if this posture of the prosecutor constituted bad faith, however, we conclude that it would not constitute a violation of Naranjo's right to due process because, as explained below, it did not prejudice Naranjo's ability to receive a fair trial.

As noted above, the due process violation will be found only if a prosecution tactic caused substantial prejudice to the defendant's right to a fair trial. Naranjo has not made that showing. The record provides no reason to believe that he cannot obtain a fair trial if charges are refiled against him. Of course, the defendant and his attorney have been harmed in certain ways as observed by the district court--principally through delay of disposition of the charge and multiplication of defense efforts and costs.⁷ But none of those preclude a fair trial. If he is later

⁷ The district court stated:

The defendant comes to court, posts a bond, gets arrested, comes to court every day, gets ready for trial, either pays his own attorney or the public pays his attorney, we go through the court process, we hear all the motions, we do the preliminary hearing, we go all the way through the process, we get down to the night before trial and the State says we're going to dismiss and refile. To me that's absolutely inappropriate.

required to go to trial on two charges simultaneously, he will not have the advantage of being tried on only the original charge and without evidence of the other misconduct, but that was an advantage that had fallen to him only because of the trial court's discretionary evidentiary ruling and the prosecutor's improvident strategic moves earlier in the proceedings. The tardiness of the prosecutor's motion to dismiss the charge has not deprived Naranjo of any evidence or any defenses that he otherwise could have raised.

III. CONCLUSION

The district court did not err when it dismissed the original charge of sexual abuse of a minor without prejudice. The district court's dismissal was consistent with the prohibition against barring the refiling of felony charges under I.C.R. 48 and I.C. § 19-3506. Dismissal with prejudice was also not warranted because no violation of Naranjo's due process rights was established. Specifically, Naranjo failed to bring forth actual evidence that the state sought dismissal acting in bad faith and even assuming bad faith occurred, that Naranjo was substantially prejudiced as a result. Accordingly, we affirm the dismissal without prejudice.

Chief Judge LANSING and Judge GRATTON **CONCUR.**